Supreme Court, U.S.
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No. 06- 06-155

IN THE
Supreme Court of the United States

IN RE: ELEANOR and RALPH SCHIANO,

Petitioners,

v.

MBNA, corporation, WOLPOFF & ABRAMSON, LLP, PRESSLER & PRESSLER, Counsellors at law, GERALD FELT, Esq., partner Pressler & Pressler, and NATIONAL ARBITRATION FORUM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI AND A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND PETITION FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED

1. Where the commission of fraud in the arbitration process, through misrepresentation of the real party in interest so that a subsequent payment of the arbitration award never reached the falsely represented arbitration claimant and instead was intercepted and taken by a non-claimant, has been established by ample evidence in the district court, is an order to compel a second arbitration with those who defrauded and lacked jurisdiction in the first arbitration, and where no party has the right or standing to compel a second arbitration, contrary to the law and a violation of Due Process?

2. Is there a right of direct appeal of a district court order that fails to confirm a final and binding arbitration award?

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Petitioners respectfully petition for a writ of certiorari and mandamus to review the judgment denial (erroneously designated motion denial) of United States Court of Appeals for Third Circuit in this case.

OPINIONS BELOW

The magistrate judge's report and recommendation to dismiss National Arbitration Forum based on immunity, Appendix ("Pet. App."), found at 32a-40a, is not published. The magistrate judge's amended report and recommendation, Pet. App. 22a-31a, dismissing all of plaintiffs' counts, except for count one which was sent to second arbitration (for arbitration of awards that were already paid) in the National Arbitration Forum, is not published. The district court order, Pet. App. 5a-21a, rejected Magistrate Judge's report to dismiss all of plaintiffs counts, except one count, and instead ordered to compel second arbitration (of arbitration awards that were already paid) of all of plaintiffs' counts in the National Arbitration Forum (who was dismissed based on immunity), is not published. The district court order, Pet. App. 3a-4a, adopting magistrate judge's report and recommendation dismissing the National Arbitration Forum based on immunity, is not published. The court of appeals' motion denial of petition for writ of mandamus (petition for writ of mandamus is original proceeding and not a motion) and motion denial of direct appeal of interlocutory order, Pet. App. 1a-2a, is not published. The court of appeals' order denying rehearing and rehearing en banc (erroneously designated pro se, BPS-041), Pet. App. 41a-42a, is not published.

STATEMENT OF JURISDICTION

The court of appeals entered the motion denial order on February 6, 2006, and denied a rehearing and rehearing en banc on May 5, 2006. Petitioners invoke this Court's jurisdiction based on 28 U.S.C. § 1254(1), 28 U.S.C. § 1651(a), 9 U.S.C. § 16(a)(1)(D).

STATUTORY PROVISIONS INVOLVED

The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, 9 U.S.C. § 16(a)(1)(D), Fair Debt Collection Practice Act, 15 U.S.C. § 1692, Fair Credit Reporting Act, 15 U.S.C. § 1681, and Internal Revenue Code, 26 U.S.C. § 108 are involved in this case.

STATEMENT OF THE CASE

1. Petitioners are citizens over age fifty and have suffered financial loss and illness. In December 2002, husband petitioner lost his job (textile company bankrupt) and became seriously ill. Defendant, MBNA, settled husband's accounts, but in March 2003 sent letter to wife with intent to arbitrate through counsel. Wife complied with arbitration.

2. In November 2003, defendant law firm, Wolpoff & Abramson, submitted arbitration documents to petitioners falsely representing themselves as attorneys for arbitration claimant, MBNA. Unbeknownst to petitioners, MBNA had sold all title to petitioners' accounts to defendant law firms in July 2003. Petitioners also allege that defendant, National Arbitration Forum (NAF), had a pre-existing relationship with Wolpoff & Abramson, and knew MBNA was not real

party in interest/claimant. Despite a lack of jurisdiction, NAF issued awards for total debt ($25,000.00) plus another $10,000.00 in legal fees to MBNA. Defendant, Pressler & Pressler, also fraudulently represented themselves as attorneys for MBNA, and brought fraudulent action in state court to enforce arbitration awards as counsel and on behalf of MBNA.

3. In October 2004, petitioners settled arbitration awards for $29,000.00, which was payment of the entire debt plus to date accrued interest. Petitioners refinanced their home with precarious subprime mortgage to pay awards. Title Company paid attorneys Pressler & Pressler on behalf of MBNA approximately $29,000.00. Pressler & Pressler acknowledged satisfaction of debt/payment in full to MBNA.

4. In January 2005, petitioners discovered that credit reporting agencies were reporting accounts as delinquent with charge off of entire accrued debt. In April 2005, petitioners filed a federal complaint, through pro bono attorney, seeking damages and declaratory relief as to confirmation/ enforcement of the final arbitration award that was paid by petitioners in October 2004, and alleging fraud and violation of federal statutes including 9 U.S.C. § 1 et seq., 15 U.S.C. § 1692, and 15 U.S.C. § 1681. Despite the payment in full of MBNA accounts, petitioners' accounts remain delinquent.

5. Defendant law firms and MBNA moved to compel arbitration. Petitioners cross moved to include vacation of the awards. The National Arbitration Forum (NAF) moved to dismiss based on immunity. There was no discovery during arbitration and no discovery in the district court. However, on their own initiative, petitioners discovered from MBNA employees in August 2005, that MBNA, represented claimant

in arbitration, never received any of petitioners' monies. Defendant law firms kept petitioners' monies and did not forward any money to MBNA.

6. Petitioners presented evidence to district court that:

(a) Documents establishing that defendant law firms had falsely represented during and after arbitration that MBNA was the real party in interest/claimant and that defendant law firms were counsel to MBNA, when in fact defendant law firms were not counsel to MBNA but rather MBNA had sold accounts to defendant law firms prior to arbitration.

(b) Credit reporting agencies were reporting an accurate status of petitioners' accounts as MBNA never received petitioners' monies which were fraudulently taken by defendant law firms instead of forwarded to represented claimant MBNA. In August 2005, Petitioners were informed by MBNA employees that their accounts were purchased by Wolpoff & Abramson in August 2003 for $2,700.00. MBNA employees informed petitioners that MBNA had not been the custodian of records since July 2003, and that MBNA never received any of petitioners' monies.

(c) Transunion reports accounts as delinquent. The larger account is reported as charged-off and currently delinquent. The smaller account is listed as charged-off/ collection account/paid. This and a zero balance means accounts were sold to a collection agency, see Credit Reporting Resource Guide, Metro 2 Format, page 6-8. The credit report shows that MBNA never received any payment from petitioners.

(d) Experian shows the accounts as delinquent with both accounts charged-off in July 2003, prior to arbitration, for the entire amount of debt. Debt is charged off again in October, 2004 for entire amount of debt plus interest. Nowhere does the credit report reflect full payment of debt plus interest (or any payment) from petitioners to MBNA. Further, original charge off date, July 2003, has been changed to July 2005.

(e) Petitioners' credit report can never be corrected as, unknown to petitioners, MBNA had sold accounts to defendant law firms in July 2003 and thus was not the owner of accounts for arbitration. Wolpoff & Abramson falsely represented in arbitration that MBNA was the claimant when in fact MBNA had sold petitioners' accounts to defendant law firm.

(f) Further, a creditor cannot charge off entire accrued debt and then supposedly receive payment of entire debt without entering reverse Internal Revenue Service (IRS) accounting entry and an accurate reflection of the balance paid history. Despite full payment of debt in October 2004, petitioners' accounts remain delinquent, which means they owe taxes on the charged-off debt, Internal Revenue Code, 26 U.S.C. § 108 (forgiven debt). Petitioners thus owe taxes on debt they already paid in full to a represented claimant but was instead taken by defendant law firms. Since petitioners accounts remain delinquent, they are also vulnerable to collection by other collection agencies to whom defendant law firms resell petitioners' accounts.

(g) In July, 2005, the magistrate judge ordered defendants to correct petitioners' credit reports. Defendants, however, could not correct petitioners' credit reports. The

magistrate judge ordered defendant law firms to submit affidavits that they sent petitioners' monies to claimant MBNA. Defendant law firms submitted false affidavits to the district court. Wolpoff & Abramson submitted an attached document that reflects only a "bulk" transfer of account receivables from a securitized pool of debt. Pressler & Pressler submitted a document that only reflects receipt of petitioners' monies by Pressler & Pressler.

(h) During the district court proceedings, Pressler & Pressler represented themselves, Wolpoff & Abramson, and MBNA. In an earlier May 2005 motion to compel arbitration, defendants submitted a false affidavit from Matthew Eastburn, MBNA. This earlier affidavit, did not correspond with the defendant law firm affidavits. The Eastburn affidavit stated that MBNA received Schiano money in October 2004 but quotes the charge-off as amounts paid. First, petitioners paid more than the charged-off amounts (petitioners paid entire debt plus interest). Second, the Eastburn affidavit did not correspond with numbers stated in the defendant law firm affidavits. Third, Eastburn stated MBNA received petitioners' payment one month prior to the date the defendant law firms claim they submitted petitioners' payment to MBNA. Finally, the Eastburn affidavit conflicted with MBNA employees' representations to petitioners that they never received petitioners' monies, that MBNA had sold petitioners' accounts in July 2003 to Wolpoff & Abramson for $2,700.00, and that MBNA had not been the custodian of records since July 2003.

(i) Petitioners demonstrated evidence that the NAF lacked jurisdiction to issue any awards in favor of MBNA as MBNA was never the real party in interest/claimant in arbitration. The awards show that the NAF based agreement

to arbitrate on dates Wolpoff & Abramson acquired petitioners' accounts (August 2003) and not the agreement to arbitrate dates between petitioners and MBNA which was the year 1999 when MBNA added arbitration agreements to the contract. Petitioners also presented evidence that there was a pre-existing financially beneficial relationship between the NAF and Wolpoff & Abramson.

7. The magistrate judge did not schedule discovery. There was no discovery as to who owned the debt during arbitration and thus the issue as to which defendant, if any, had right to compel arbitration was not decided. The magistrate judge does, however, specifically note that the credit reporting agencies were accurately reporting the status of petitioners' accounts as MBNA never received petitioners' monies, Pet. App. at 26a.

8. The magistrate judge dismissed NAF for immunity and dismissed petitioners' counts except for violation of the FDCPA. Petitioners objected to the report and recommendations, including failure to confirm the awards, dismissal of the counts, unconscionable arbitration fees for the second arbitration, failure to recognize the fraud allegations, failure to determine whether any of the defendants even had a right to compel arbitration, and lack of immunity to NAF. The district court affirmed the report and recommendation as to the NAF determination, and rejected the report and recommendation as to the other defendants. The district court stays petitioners' counts but affirms as to compel second arbitration.

9. The district court did not make any findings of fact and did not address whether any of the defendants were even entitled to compel arbitration. MBNA sold the accounts prior

to arbitration and thus had no standing to compel arbitration. Defendant law firms purchased the accounts but defrauded petitioners by falsely and fraudulently representing MBNA as claimant and then took petitioners' monies.

10. Further, the district court did not address declaratory relief to confirm the arbitration awards and final payment of same. 9 U.S.C. §§ 16(a)(1)(D) states that the failure to confirm an award is subject to direct appeal. Section 16, however, also states that there is no direct appeal of an order to compel arbitration. The FAA does not address an order to compel a second arbitration when the arbitration award has been paid and satisfied, and district court failed to confirm the award.

11. On December 30, 2005, petitioners filed a Motion for Stay, Leave to Appeal and a Petition for Writ of Mandamus requesting that district court vacate the order to compel the second arbitration and decide the issues of who is the real party in interest, whether any of the defendants were entitled to compel arbitration, whether the second arbitration can be compelled when the awards are already paid, whether fraud precludes a second arbitration with those who defrauded petitioners, whether the FAA requires confirmation of the awards, and whether the second arbitration fees are unconscionable.

12. On February 6, 2006, the Third Circuit panel simply states "foregoing motions are denied," Pet. App. 1a-2a. A Petition for Writ of Mandamus is not a motion but rather an original proceeding that required a specific denial of the writ. Thus, the Third Circuit only heard the Motions for Stay and Leave to Appeal and did not address petitioners' Writ of Mandamus. The February 6, 2006 motion denial designates

the matter was decided by standing motion panel "B." The Third Circuit standing motion panel "B", however, is different from the Third Circuit judges designated on Order (matter was submitted on December 30, 2005 – same day as filed).

13. Petitioners brought a Petition for En Banc/Panel Rehearing which was denied. The Third Circuit erroneously designates Petitioners as Pro Se (*BPS-041* designation), Pet. App. 41a-42a. Petitioners were and are represented by counsel. Petitioners bring the within Petition for Writ of Mandamus/Certiorari to United States Supreme Court.

14. Petitioners' motion for Stay was denied.

15. The United States Department of Justice is currently investigating the matter.

REASONS FOR GRANTING THE PETITION

The Petitions should be granted. This case involves issues of significant national interest and policy. The arbitration process is utilized by thousands each year and thus has far reaching effects on the public. When fraud during arbitration has been established by ample evidence in the district court, an order to compel a second arbitration with those who defrauded during the first arbitration is not only contrary to the law but amounts to condoning fraud and rewarding those who have defrauded.

If federal policy, as it does, favors arbitration, consumers and all others forced to arbitrate must be assured that the arbitration process is fair and equitable and that their federal courts will not tolerate fraud particularly by those in a

position of power who prey on the disadvantaged. Fraudulent and abusive collection practices have a disproportionate effect on the poor, elderly, minorities, and the ill or disabled. It is the disadvantaged who are typically preyed upon and cannot afford an attorney to combat fraudulent collection practices. If this Court does not grant the within Petitions, petitioners, along with thousands of other consumers, who have abided by the law, proceeded to arbitration, and paid the fraudulently obtained arbitration awards, will be forced to accept fraud. This would pave the way for the powerful to continue to prey on and defraud the disadvantaged. The law is clear that consumers should not be forced to arbitrate for a second time, after payment and satisfaction of awards, especially with those who defrauded them during first arbitration. The within Petitions for Writ of Certiorari and Mandamus should be granted as federal courts must not tolerate fraud and must apply the law equally and fairly to all.

In addition, all provisions of the FAA, 9 U.S.C. § 16, must be enforced. While section 16(b)(3) of the Act states there is no direct appeal of interlocutory orders to compel arbitration, § 16(a)(1)(D) states there is a direct appeal of interlocutory orders that fail to confirm awards. Courts cannot arbitrarily decide which provision of the FAA to enforce and which provisions of the FAA not to enforce. The Petitions for Writ of Certiorari/Mandamus should be granted.

Decision to send Petitioners to a second arbitration is contrary and in conflict with Federal Arbitration Act and United States Supreme Court and Court of Appeals law.

A. All actions commenced must be brought in the name of real party in interest/claimant and the federal courts must determine who is entitled to compel arbitration and what parties intended to arbitrate.

In accordance with the law, the district court and not arbitrators must determine who, if anyone, has right to compel arbitration and what the parties intended to arbitrate. *Prima Paint Corp. v. Flood & Conklin*, 388 U.S. 395 (1967); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Paine Webber, Inc. v. Hartman*, 921 F.2d 507 (3d Cir. 1990); *Trippe Mfg. Co. v. Niles Audio Corp.*, 401 F.3d 529 (3d Cir. 2001); *E.I. Dupont De Nemours and Company v. Rhone Poulenc Fiber and Resin Intermediates*, 269 F.3d 187 (3d Cir. 2001); *I.S. Joseph Co. v. Michigan Sugar Co.*, 803 F.2d 396 400 (8th Cir. 1986). Any power that an arbitrator has to resolve dispute must find its source in a real agreement between parties. The arbitrator has no independent source of jurisdiction apart from the consent of the parties.

If there is in fact a dispute as to whether an agreement to arbitrate exists — then that issue must first be determined by the court as a prerequisite to the arbitrator taking jurisdiction. *John Wiley & Sons, Inc. v. Livingston*, supra. Public policy mandates that federal courts, and not arbitrators, determine the issue of what parties intended to arbitrate. *AT & T Technologies, Inc. v. Communication Workers*, 475 U.S. 656 (1986). In the case at bar, petitioners obviously never intended to arbitrate issue of fraud by defendants that would occur during the first arbitration.

"Every action shall be prosecuted in the name of real party in interest." F.R.C.P. 17(a). Federal courts have held that an assignee for purposes of collection who holds legal title to debt . . . is the real party in interest even though the assignee must account to the assignor for whatever is recovered in the action. 6A Charles Allan Proc. § 1545 at 348 (1990) (omitting citations); *See also, Akins v. N & J Dick & Co.*, 39 U.S. 114 (1840). In *Sanford Investment Company, Inc., v. Ahlstrom*, 198 F.3d 415 (3d Cir. 1999), the Third Circuit determined that the company (American) completely assigned its right to enforce payment and consequently lacked standing to sue, *See also, Bob McLemore and Company v. Maco Homes, Incorporated*, 180 F.3d 163 (4th Cir. 1999); *Greer v. O'Dell*, 305 F.3d 1297 (11th Cir. 2002).

In this case, MBNA sold petitioners' accounts prior to arbitration and thus was no longer the owner or real party in interest and had no right to first arbitration and has no right to compel a second arbitration. The defendant law firms falsely represented MBNA as the claimant during arbitration and that they (defendant law firms) were the attorneys for MBNA. If defendant law firms were the attorneys for MBNA, defendant law firms do not own petitioners' accounts and are not the assignees of the accounts, and cannot compel a second arbitration. If, however, as petitioners allege, defendant law firms purchased petitioners' accounts and fraudulently represented MBNA as the claimant during the first arbitration then defendant law firms have committed fraud and the arbitration agreement is revoked and the contract is null/void and unenforceable as defendant law firms, through fraud, failed to abide by the arbitration agreement. In either case, none of the defendants, including MBNA, have standing to compel a second arbitration. There was a lack of jurisidiction in the first arbitration as the

claimant was falsely misrepresented, and there is lack of authority to compel a second arbitration as fraud in the first arbitration revokes any basis for standing to compel arbitration.

The district court never addressed the issues of real party in interest/claimant and whether any of the defendants have standing to compel arbitration. Once accounts have been assigned/purchased, the assignees are the real party in interest and must be so designated as the claimant in arbitration. MBNA sold the accounts and thus never had the right to arbitrate. Defendant law firms defrauded petitioners and fraudulently took their money and thus have no right to compel second arbitration.

B. Payment of arbitration awards is final and binding, and fraud committed by defendants in first arbitration negates any obligation to compel petitioners to proceed to second arbitration.

Petitioners have already paid the fraudulently obtained first arbitration awards and, therefore, cannot be compelled to proceed to a second arbitration. Petitioners' claims for fraud and violation of federal law/statutes must remain in the federal district court.

Petitioners' case at bar is on point with *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976). In *Hines*, employees proceeded to arbitration for wrongful discharge. The collective-bargaining contract provided that decision by arbitration committee would be final and binding on all parties. The arbitration committee sustained the discharges (employees were eventually reinstated). After arbitration decision, the employees discovered subsequent information

that indicated the charges of dishonesty against them might have been false. The employees brought action in district court for fraud against the company and union, who represented them, asserting the union made no effort to ascertain the truth and thus violated its duty of fair representation. Summary judgment was granted in favor of the company on ground that arbitration decision was final and binding absent a showing of bad faith. The court of appeals reversed the bad faith finding, but affirmed on ground that finality provision of collective-bargaining contract had to be observed.

The United States Supreme Court reversed the court of appeals and held that it was improper to dismiss petitioners' suit against respondent employer, since if petitioners prove an erroneous discharge and that respondent union's breach of duty of fair representation tainted the arbitration committee's decision, they are entitled to an appropriate remedy against the employer as well as the union. Thus, the employees were permitted to bring their fraud claims in federal court following a final and binding arbitration decision.

The case at bar is on point with *Hines*, supra, and indeed more egregious than the facts presented in *Hines*. Following the final and binding arbitration awards, petitioners paid the entire original debt plus all accrued interest. Petitioners' $29,000.00, however, cannot be located as the credit reports continue to show the accounts as delinquent. The magistrate judge conceded that MBNA never received petitioners' monies. Petitioners' credit reports can never be corrected as MBNA sold their accounts prior to arbitration. MBNA is no longer the custodian of record and has no authority to correct petitioners' accounts on the credit reports. Defendant law

firms, who fraudulently represented themselves as counsel to claimant MBNA, are the owners of petitioners' accounts. Defendant law firms cannot correct petitioners' credit reports as they can only report that they (defendant law firms) kept petitioners monies as debt buyers, which would be conceding fraud on the part of defendant law firms.

Hines, *supra*, was explicit in that those who defraud during an arbitration proceeding cannot further benefit from the fraud, and that one who is defrauded has an action in federal court for damages. In *Stephanie Brown v. Dillard's Inc.*, 403 F.3d 1004 (9th Cir. 2005), the Ninth Circuit reinforced that a party seeking to avoid enforcement of an arbitration agreement can only invoke a defense that would be available to a party seeking to avoid the enforcement of any contract. The Ninth Circuit determined that the defendant had breached the arbitration contract and thus waived the right to enforcement of same, and, therefore, arbitration could not be compelled. Likewise, in the case at bar defendant law firms, as purchasers of debt, falsely and fraudulently misrepresented the true party in interest during and after arbitration and fraudulently took petitioners' monies and thus breached the arbitration agreement. The defendant law firms have breached the arbitration agreement and thus waived any right to enforcement of any further arbitration proceedings.

Further, according to the arbitration agreement, all awards are to be final and binding. The district court and Third Circuit, however, did not address the arbitration agreement, did not determine whether any defendants are entitled to compel arbitration, and did not determine whether there was fraud and bad faith during first arbitration. Instead, contrary to *Hines*, *supra*, the district court ordered a second arbitration regarding petitioners' allegations of fraud during

and after arbitration and federal law violations (including the Fair Debt Collection Practice Act 15 U.S.C. § 1692, Fair Credit Reporting Act, 15 U.S.C. § 1681, and Federal Arbitration Act, 9 U.S.C. § 16).

Based on established Supreme Court and federal law, this Court must reverse the Third Circuit motion denial for writ of mandamus as lower decisions are contrary to already established law in that there was fraud during and after arbitration proceedings and petitioners are, therefore, entitled to proceed with their claims for fraud and violation of federal law/statutes in the federal district court.

C. It is a violation of due process to compel a second arbitration when there was lack of jurisdiction for first arbitration as awards were obtained through fraud, and when there is no party who has right to compel second arbitration. Further, the fees for second arbitration are unconscionable as fraudulently obtained arbitration awards and first arbitration fees have already been paid. Petitioners are entitled to proceed with claims for fraud in federal district court.

Under the Fourteenth Amendment of the United States Constitution, each individual is entitled to due process. The lower court orders to compel a second arbitration violate the due process clause of the Fourteenth Amendment. In applying precedent law, petitioners establish that none of the defendants are entitled to compel arbitration. MBNA sold all title to accounts to defendant law firms, is no longer owner of the accounts, and has no right to compel arbitration. Defendant law firms have committed fraud by misrepresenting the real party in interest during and after arbitration and by fraudulently taking petitioners' monies.

Fraud during arbitration is not a basis to compel a second arbitration and none of defendants have standing to compel arbitration.

Similar to *Hines*, *supra*, petitioners are entitled to proceed with claims for fraud in federal court. To compel a second arbitration, after payment of first arbitration awards, is to condone fraud and reward those who have defrauded. Moreover, to compel a second arbitration in the NAF, who it is alleged has a financially beneficial relationship with the defendant law firms and was aware of the lack of jurisdiction for the first arbitration (on face of awards NAF designates date of agreement to arbitrate as date accounts were acquired by the defendant law firms rather than the date petitioners and MBNA entered into agreement to arbitrate), is similar to asking the "fox to guard the hen house."

Federal courts cannot and must not tolerate fraud. To compel a second arbitration with those who defrauded in the first arbitration is a violation of due process, contrary to the law, and condones fraud by rewarding those who have defrauded. Further, petitioners have complied with the law, proceeded to arbitration, and paid the fraudulently obtained arbitration awards including the first arbitration fees. Neither the district court nor the Third Circuit decided the issue of unconscionable arbitration fees. In order to pursue their claims of fraud and violation of federal law versus defendants in the NAF; petitioners will have to pay thousands of dollars. Being forced to pay second arbitration fees to determine how petitioners were defrauded in the first arbitration is not only contrary to the law but unconscionable.

Unconscionable and prohibitive arbitration fees deny petitioners of due process of their claims. *Green-Tree*

Financial Corp.-Alabama v. Randolph, 531 U.S. 79 (2000). In *Blair v. Scott Specialty Gases*, 283 F.3d 595 (3d Cir. 2002), the Third Circuit also addressed this issue.

In *Blair*, the Third Circuit cited other cases concerned with the same issue prior to *Green-Tree Financial Corp.-Alabama v. Randolph, supra.* Citing *Cole v. Burns Int. Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), Third Circuit states:

> We are unaware of any situation in American jurisprudence in which a beneficiary of a federal statute has been required to pay for the services of the judge assigned to hear her or his case. Therefore, it would undermine Congress's intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court.

Id. at 1484.

Blair, supra, also cites *Shankle v. B-G Maintenance Management of Colorado, Inc.*, 163 F.3d 1230, 1234-35 (10th Cir. 1999), where the Tenth Circuit reached similar result holding that to compel arbitration where claimant would be required to pay sum of $1,875.00 to $5,000.00 is unconscionable and thus arbitration is unenforceable. *Blair* went on to state that in *Green Tree* the Court placed initial burden of proof on party resisting arbitration to demonstrate that arbitration would be prohibitively expensive by showing "the likelihood of incurring such costs." *Id.* at 92. The *Green Tree* Court found the plaintiff had not met her burden of

proving costs of arbitration or inability to pay. *Green Tree* suggests an eventual burden shift when it stated that "how detailed the showing of prohibitive expense must be before the party seeking arbitration must come forward with contrary evidence is matter we need not discuss for ... neither during discovery nor when the case was presented on the merits was there any timely showing at all on the point." *Id.*

Petitioners have met the burden of demonstrating inability to pay and that the fees are unconscionable and prohibitive as they submitted NAF's own brochure regarding fees in arbitration matters. Petitioners paid the debt in full plus interest, legal fees, and arbitration fees ($29,000.00) in full satisfaction of debt. The fees mandated by the NAF will far exceed this amount as petitioners' claims are substantial. Petitioners' credit report has remained delinquent for nearly two years. Further, their credit report can never be corrected as MBNA is no longer the custodian of petitioners' accounts. Filing fees for $75,000.00 claim is minimum of $750.00 (petitioners' damages exceed $75,000.00 and cannot refinance again as the debt to MBNA is still falsely delinquent and must be paid again). Participatory hearing fees are $2,500.00 for initial one hour hearing and $1,000.00 for additional hours (claims $100,000.00 to $250,000.00 are $4,000.00 for initial one hour session and $1,500.00 for each additional one hour session) there are additional fees for each discovery order, subpoenas, time extensions, opinions, etc..

D. Defendants committed fraud and violated the Fair Debt Collection Practice Act (FDCPA) and other federal statutes. Petitioners' action for fraud and violation of federal statutes must remain in federal court.

The defendant law firms fraudulently misrepresented the real party in interest during and after arbitration. MBNA is listed as claimant/real party in interest on all documents submitted by the defendant law firms. The defendant law firms, however, as debt buyers of petitioners' accounts prior to arbitration were the real party in interest. Thus, not only were petitioners deceived and defrauded out of their monies which they paid to defendant law firms on behalf of represented claimant MBNA, the defendant law firms also violated multiple sections of FDCPA, 15 U.S.C. § 1692, enacted to thwart abusive and false debt collection practices.

In the case at bar, the defendant law firms purposefully misrepresented the true party in interest in violation of the FDCPA. Further, the defendant law firms falsely represented to petitioners that their client, MBNA, would not accept anything less than payment in full of the entire debt. First, MBNA no longer owned the debt and was not the real party in interest. Second, MBNA had already accepted one third of balance on husband's MBNA account, but then informed the wife in writing that her accounts would be sent to their attorneys for arbitration.

In *Pooja Goswami, individually and on behalf of all other similarly situated v. American Collection Enterprise*, 337 F.3d 488 (5th Cir. 2004), the Fifth Circuit held that the FDCPA does not permit collection agencies to deal in a deceitful manner. False statements are not permitted under the FDCPA. Here, contrary to law, not only was the real party

in interest falsely and fraudulently misrepresented by the defendant law firms and petitioners' monies taken by the defendant law firms, but also the owner status, amount owed, and the amount of payment that MBNA would accept. These are serious violations of the law, and contrary to congressional public policy.

E. Under the Federal Arbitration Act, lower courts have a duty to confirm final and binding awards and petitioners are entitled to direct appeal of interlocutory order failing to confirm final and binding arbitration awards.

The Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(D), permits direct appeal of an interlocutory order that fails to confirm arbitration awards. Neither the district court nor the Third Circuit addressed this issue. Instead, the lower courts ignored this issue and proceeded to compel second arbitration of final and binding arbitration awards in violation of established federal law, *see Hines*, *supra.* Under the FAA, while an order to compel arbitration is not subject to direct appeal, an order failing to confirm an award is subject to direct appeal. Courts cannot be permitted to circumvent express provisions of the Arbitration Act by simply failing to address the issue.

Further, this Court has explicitly recognized a narrow class of collateral orders which do not meet the definition of finality but are nevertheless immediately appealable under 28 U.S.C. § 1291 because they conclusively determine a disputed question that is completely separate from the merits of the actions, effectively unreviewable on appeal from a final judgment, and too important to be denied review. *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424 (1985);

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

Petitioners' case involves questions separate from the merits of the action, forces them to a second arbitration which is unreviewable on appeal since it has already occurred, and involves issues that are too important to be denied review. This Court must, therefore, grant petitioners' Petitions for Writ of Certiorari and/or Mandamus.

Under the doctrine of functus officio, the courts cannot compel a second arbitration of final and binding arbitration awards. A court may only remand to arbitrators for clarification of an unpaid ambiguous award. The NAF award to MBNA is not ambiguous. Petitioners already paid the award. In *Bayne v. Morris*, 68 U.S. (1 Wall.) 97 (1863), this Supreme Court held that: "Arbitrators exhaust their power when they make a final determination on the matters submitted to them. They have no power after having made an award to alter it; the authority conferred on them is then at an end." *Id* at 99. The doctrine is motivated by a perception that arbitrators, lacking the institutional protection of judges, may be more susceptible to outside influences pressuring for a different outcome. *See, e.g., Office [Official] & Professional Employees International Union, Local No. 471 v. Brownsville General Hospital*, 186 F.3d 326 (3d Cir. 1999) (name was corrected from Official to Office); *Legion Insurance Co. v. VCW, Inc.*; *Preferred Administrative Services, Inc.*, 198 F.3d 718 (8th Cir. 1999); *International Brotherhood of Teamsters v. Silver State Disposal Service, Inc.*, 109 F.3d 1409 (9th Cir. 1997).

In the case at bar, not only is a second arbitration of a final and binding award contrary to law, *Hines*, *supra*, but it

is also alleged that the NAF was aware that MBNA was not the real party in interest and that the NAF had a financially beneficial relationship with defendant law firm, Wolpoff & Abramson. If petitioners' allegations are correct, the chance of influence by defendants in a second arbitration is extremely high.

Moreover, the arbitrators' duties have been completed. The awards have already been paid in full by petitioners. Thus, there is absolutely nothing else the arbitrators can decide. It is up to the federal courts and not arbitrators to decide whether fraud occurred during and after arbitration proceedings, *Hines, supra.*

F. Remand to Third Circuit is appropriate when there is no opinion expressed as to why Writ of Mandamus and Direct Appeal of Interlocutory Order, failing to confirm awards, have been denied.

A petition for writ of mandamus is an original proceeding that requires specific denial of the writ. The Third Circuit erroneously denied the petition via motion. Moreover, the Third Circuit offers no reason for its denial of a writ. This case is currently being investigated by the United States Department of Justice for the commission of a crime. The Crime Victims' Rights Act, 18 U.S.C. § 3771(d)(3), states that when a court of appeals denies a writ of mandamus for relief sought, the reason for the denial shall be clearly stated in an written opinion. Further, the Third Circuit Internal Operating Procedure (I.O.P.) Rule 6.2 states that an order of denial is only appropriate when there are findings of fact not clearly erroneous, and the law applied was not erroneous. Here, there were no findings of fact and the district court did not apply established federal law.

When a state supreme court did not articulate reasons for the denial of mandamus, this Court remanded for clarification as to why the mandamus was denied. *Philadelphia Newspapers, Inc., et al. v. Jerome, Judge*, 434 U.S. 241 (1978). The Third Circuit offers no reasons for motion denial of mandamus and appeal of the interlocutory order. The within case is of extreme importance as it affects thousands of consumers. The lower court orders are contrary to public policy and established law.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari and Mandamus should be granted. The Court may wish to consider summary reversal of the Court of Appeals or remand to the Court of Appeals.

Respectfully submitted,

HELEN E. COONEY
11 Susan Avenue
Wayne, New Jersey 07470
(973) 633-8021

Attorney for Petitioners

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING THE FOREGOING MOTIONS DATED DECEMBER 30, 2005

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

December 30, 2005
#B-41

No. 05-5565

In Re: Eleanor Schiano and Ralph Schiano, Petitioners
(Related to New Jersey-Newark Civil No. 05-cv-0 1771)

PRESENT: RENDELL, SMITH and BECKER, *Circuit Judges.*

1) Petition by Eleanor Schiano and Ralph Schiano for Writ of Mandamus or in the alternative to Construe the Petition as a Notice of Interlocutory Appeal.

2) Appendix in Support of Petition for Writ of Mandamus or in the alternative To Construe the Petition as a Notice of Interlocutory Appeal.

3) Motion by Petitioners, Eleanor Schiano and Ralph Schiano, for Stay of District Court Order Compelling Arbitration Pending Petition for Writ of Mandamus and/or Permission for Interlocutory Appeal.

Appendix A

4) Motion by Respondents for extension to file answer to petition.

5) Answer by Respondents to petition. (Not filed unless the Court Directs)

6) Response by Petitioners in Opposition to file answer to petition.

/s/ Tonya Y. Wyche
Case Manager
Direct Dial-267-299-2938

Response for Motion for Stay due by **1/12/06.**

ORDER

The foregoing motions are DENIED.

By the Court,

/s/ Marjorie O. Rendell
Circuit Judge

Dated: February 6, 2006

APPENDIX B — ORDER ADOPTING NOVEMBER 16, 2005 REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED DECEMBER 19, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 05-CV-1771 (JLL)

ELEANOR and RALPH SCHIANO, as wife and husband, and individually,

Plaintiffs,

v.

MBNA, corporation; WOLPOFF & ABRAMSON, LLP; PRESSLER & PRESSLER, Counsellors at Law; GERALD FELT, Esq., partner PRESSLER & PRESSLER; NATIONAL ARBITRATION FORUM,

Defendants.

ORDER ADOPTING NOVEMBER 16, 2005 REPORT AND RECOMMENDATION

This Court had referred Defendant National Arbitration Forum's ("NAF") motion to dismiss Plaintiffs' Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim [#19] to the Honorable Ronald J. Hedges, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B). Magistrate Judge Hedges filed a Report and

Appendix B

Recommendation on NAF's motion on November 16,2005. Having reviewed *de novo* the Report and Recommendation of November 16, 2005, and having considered Plaintiffs' objections to the Report, this Court adopts Magistrate Judge Hedges November 16, 2005 Report and Recommendation as the Opinion of this Court and dismisses Plaintiffs' Amended Complaint against Defendant NAF.

IT IS on this 19th day of December, 2005,

ORDERED that the Report and Recommendation of Magistrate Judge Hedges filed November 16, 2005, Defendant NAF's motion to dismiss [CM/ECF Docket Entry # 19] be granted, is hereby ADOPTED as the findings of fact and conclusions of law of this Court; and it is further

ORDERED that Defendant NAF is hereby dismissed from this case.

/s/ Jose L. Linares
Jose L. Linares,
UNITED STATES DISTRICT JUDGE

DATED: December 19, 2005

APPENDIX C — OPINION AND ORDER REJECTING THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED DECEMBER 19, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.: 05-CV-1771 (JLL)

ELEANOR and RALPH SCHIANO, as wife and husband, and individually,

Plaintiffs,

v.

MBNA, corporation; WOLPOFF & ABRAMSON, LLP; PRESSLER & PRESSLER, Counsellors at Law; GERALD FELT, Esq., partner PRESSLER & PRESSLER; NATIONAL ARBITRATION FORUM,

Defendants.

OPINION AND ORDER REJECTING THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

This matter comes before the Court on the objections of Plaintiffs Eleanor and Ralph Schiano (collectively "Plaintiffs") to the December 7, 2005 Report and Recommendation (amended on December 9, 2005) of United States Magistrate Judge Ronald D. Hedges regarding Defendants MBNA Corp.,

Wolpoff & Abramson, LLP, Pressler and Pressler, and Gerald J. Felt, Esq.'s (collectively "Collection Defendants") motion to dismiss the Amended Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, or in the alternative to compel arbitration [#10].[1] Additionally, Magistrate Judge Hedges ruled on Plaintiffs' motion to amend the Amended Complaint [22] as part of the Report and Recommendation filed December 7, 2005. Pursuant to Local Civil Rule 72.1(c)(2), this Court has conducted a *de novo* review of Magistrate Judge Hedges' December 9 Report and Recommendation to which Plaintiffs have objected, and a review for clear error as to the denial of Plaintiffs' motion to amend. For the reasons set forth below, the Court affirms Magistrate Judge Hedges decision to deny Plaintiffs' motion to amend their Amended Complaint, rejects the December 9 Report and Recommendation; and compels arbitration of Plaintiffs' claims against Defendants MBNA Corp., Wolpoff & Abramson, LLP, Pressler and Pressler, and Gerald J. Felt, Esq., and stays this action.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A detailed factual background of this case is set forth in the November 16, 2005 and December 9, 2005 Report and Recommendations, and will not be repeated here, except where necessary to provide context for the *de novo* review of Magistrate Judge Hedges' December 9 Report and Recommendation. The Court notes that it has adopted Magistrate Judge Hedges'

1. The December 7, 2005 Report and Recommendation was amended on December 9, 2005, however the amended Report and Recommendation did not make any substantive changes.

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November 16, 2005 Report and Recommendation dismissing Defendant National Arbitration Forum ("NAF"), thus NAF will not be discussed herein.

On May 26, 2005, the Collection Defendants filed a motion to dismiss, or in the alternative to compel arbitration, which was opposed by Plaintiffs. The matter was referred to Magistrate Judge Hedges, pursuant to 28 U.S.C. § 636(b)(l)(B), Rule 72(b) of the Federal Rules of Civil Procedure and Rule 72.1(a)(2) of the Local Civil Rules, and on December 9, 2005 an Amended Report and Recommendation was issued. In his December 9 Report and Recommendation, Magistrate Judge Hedges recommended granting Defendants' motion to dismiss Counts II through VIII with prejudice, and granting Defendants' motion to compel arbitration on Count I. Although contained in the Report and Recommendation, Magistrate Judge Hedges ordered the denial of Plaintiffs' motion to amend their Amended Complaint,

Pursuant to L. Civ. R. 72.1(c)(2), Plaintiffs timely filed an objection to the entirety of Magistrate Judge Hedges' Report and Recommendation. As explained below, this Court must review the Defendants' motion *de novo* and owes no deference to Magistrate Judge Hedges' Report and Recommendation. In doing so, this Court has reviewed all of the submissions, the cases cited by the parties and in the Report and Recommendation, and conducted further research on the issues raised. As for Plaintiffs' objection to Magistrate Judge Hedges' ruling on their motion to amend, this Court will construe it as an appeal of that decision.

Appendix C

LEGAL DISCUSSION

A. Standard of Review

When the magistrate judge addresses motions that are considered "dispositive," such as to grant or deny a motion to dismiss, a magistrate judge will submit a Report and Recommendation to the district court. 28 U.S.C. § 636(b)(l)(A); Fed. R. Civ. P. 72; L. Civ. R 72.1(a)(2). The district court may then "accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate [magistrate judge]. The judge may also receive further evidence or recommit the matter to the magistrate [magistrate judge] with instructions." 28 U.S.C. § 636(b)(l)(C); *see also* L. Civ. R. 72.1(c)(2). Unlike an Opinion and Order issued by a Magistrate Judge, a Report and Recommendation does not have force of law unless and until the district court enters an order accepting or rejecting it. *United Steelworkers of Am. v. N. J. Zinc Co., Inc.*, 828 F.2d 1001, 1005 (3d Cir. 1987).

The standard of review of a Magistrate Judge's determination depends upon whether the motion is dispositive or non-dispositive. With respect to dispositive motions, the district court must make a *de novo* determination of those portions of the Magistrate Judge's Report to which a litigant has filed an objection. 28 U.S.C.§ 636(b)(l)(C); Fed. R. Civ. P. 72(a); L. Civ. R. 72.1(c)(2); *see also State Farm Indem. v. Fornaro*, 227 F. Supp. 2d 229, 231 (D.N.J. 2002); *Zinberg v. Washington Bancorp., Inc.*, 138 F.R.D. 397, 401 (D.N.J. 1990) (concluding that the court makes a *de novo* review of the parts of the report to which the parties object).

Appendix C

A United States Magistrate Judge may hear and determine any [non-dispositive] pretrial matter pending before the court pursuant to 28 U.S.C. § 636(b)(1)(A). The district court will only reverse a magistrate judge's decision on these matters if it is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); Fed. R Civ. P.72(a); L. Civ. R. 72.1(c)(1)(A). Therefore, "this Court will review a magistrate judge's findings of fact for clear error." *Lithuanian Commerce Corp., Ltd. v. Sara Lee Hosiery*, 177 F.R.D. 205, 213(D.N.J. 1997) (citing *Lo Bosco v. Kure Eng'g Ltd.*, 891 F. Supp. 1035, 1037 (D.N.J. 1995)). Under this standard, a finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been comitted." *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985) (citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). The district court will not reverse the magistrate judge's determination, even in circumstances where the court might have decided the matter differently. *Bowen v. Parking Auth. of City of Camden*, 2002 WL 1754493, *3 (D.N.J. Jul. 30, 2002). "A district judge's simple disagreement with the magistrate judge's findings is insufficient to meet the clearly erroneous standard of review." *Andrews v. Goodyear Tire & Rubber Co., Inc.*, 191 F.R.D. 59, 68 (D.N.J. 2000).

Here, Plaintiffs object to Magistrate Judge Hedges' recommendation that the Collection Defendants' motion to dismiss Counts II through VIII of the Amended Complaint be dismissed and that Count I be submitted to arbitration. Therefore, this Court will examine Defendants' motion under a *de novo* standard of review. In conducting this review, the

Court "owes no deference to the Magistrate Judge's findings and conclusions." *Taberer v. Armstrong World Indus., Inc.*, 954 F.2d 888, 904 (3d Cir. 1992). Plaintiffs also appeal Magistrate Judge Hedges' decision to deny their motion to amend the Amended Complaint, which will be reviewed by this Court under a clearly erroneous standard.

In light of this framework, the Court turns to Plaintiffs' objections to Magistrate Judge Hedges' December 9 Report and Recommendation and Plaintiffs' appeal of the denial of their motion to amend.

B. Motion to Amend

Magistrate Judge Hedges held that Plaintiffs were not permitted to amend their Amended Complaint to include the word "vacate" which would add a claim for vacating the arbitration award. The rationale is that where there is no reasonable basis for setting the arbitration award aside, given that the award was issued almost one year before Plaintiffs filed their Complaint with this Court, permitting an amendment at this time would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962).

The legal standard governing a motion to amend is well settled. Federal Rule of Civil Procedure 15(a) provides that "leave [to amend] shall be freely given when justice so requires." Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993).

Appendix C

Plaintiffs cross moved to amend the Amended Complaint, to "include specific words 'to vacate' arbitration awards and to revise Third Count to include violation of Equal Credit Opportunity Act, 15 U.S.C. 1691." (Plaintiffs Mtn to Amend at 12). The Court has thoroughly read Plaintiffs' brief[2] in support of their motion to amend [CM/ECF Docket Entry # 22] and found no legal argument supporting an amendment to add a claim for vacating the arbitration award or add a claim for violation of the Equal Credit Opportunity Act ("ECOA"). The Court did, however, find the following argument in Plaintiffs' notice of motion:

> [P]laintiffs respectfully request that the Third Count be amended to include violation of the Equal Credit Opportunity Act, 15 U.S.C. 1691. Pursuant to law, a complaint need not specifically identify the applicable statute or law in order to properly raise a claim for relief under the notice-pleading standard embodied in the Federal Rules of Civil Procedure 8(a). *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129 (7th Cir. 1992).

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2. Mindful that Plaintiffs' counsel practices in federal court, the Court wishes to comment on the formatting of her briefs. A large portion of the briefs contain text that is in underlined and bold-faced type. This approach results in a document that is unnecessarily difficult to read. With all due respect to Plaintiffs' counsel, this type of formatting does not lead to effective advocacy. The Court would greatly appreciate if Plaintiffs' counsel would minimize the use of text that is in underlined or bold-faced type. Please be advised to follow the typeface conventions set forth in The Bluebook, A Uniform System of Citation (18th ed. 2005).

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Even if notice pleading is sufficient to state a claim under the Equal Credit Opportunity Act, it would be futile to permit Plaintiffs to amend. 'To establish a prima facie case under ECOA the class members must show that (1) plaintiff was a member of a protected class; (2) plaintiff applied for credit from defendants; (3) plaintiff was qualified for the credit; and (4) despite qualification, plaintiff was denied credit." *In re Chiang*, 385 F.3d 256, 259 (3d Cir. 2004). There are no facts on which Plaintiffs would be able to plead a prima facie case under the ECOA. In addition, the Court has not been able to find, nor have Plaintiffs pointed to, a case in which a plaintiff asserted an ECOA claim for failure to negotiate a settlement to resolve their outstanding debt with a creditor. Therefore, even though Magistrate Judge Hedges did not address the request to amend the Amended Complaint to add an ECOA claim, the Court finds that Plaintiffs' motion is denied.

As for the motion to amend to add the word "vacate," the Court finds that there is nothing in the record to lead this Court to conclude that Magistrate Judge Hedges' ruling was clearly erroneous or contrary to law. Magistrate Judge Hedges thoroughly considered Plaintiffs' request and determined that the period in which Plaintiffs could have raised any challenges contesting the arbitration award lapsed about nine months prior to Plaintiffs' Complaint being filed. Therefore, Magistrate Judge Hedges' denial of Plaintiffs' motion to amend is affirmed.

Appendix C

C. Motion to Dismiss, or, in the Alternative, Compel Arbitration

For the reasons that follow, this Court respectfblly disagrees with Magistrate Judge Hedges' recommendations and concludes that the entire matter is subject to arbitration. In making this conclusion, the Court does not decide the merits of Plaintiffs' claims or even deem them adequately pled. Furthermore, the Court points out that Magistrate Judge Hedges' recitation of the facts is not law of the case and has no preclusive effect as Plaintiffs apparently believe. Plaintiffs' counsel must certainly be aware that, in deciding a motion to dismiss under Federal Rule 12(b)(6), all allegations in the complaint must be taken as true and viewed in the light most favorable to the plaintiff. *Gomez v. Toledo*, 446 U.S. 635, 636 n.3 (1980); *Robb v. Philadelphia*, 733 F.2d 286, 290 (3d Cir. 1984). Therefore, Magistrate Judge Hedges was merely enunciating the facts Plaintiffs rely upon in their Amended Complaint.

In addition to moving to dismiss Plaintiffs' Amended Complaint, Defendants seek to compel arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* Section 4 of the FAA provides in, relevant part:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that

> such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4. The FAA dictates that any agreement to settle a dispute by arbitration "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA permits a district court to compel, or enjoin, arbitration as circumstances may require. 9 U.S.C. §§ 3, 4; *John Hancock Mut. Life Ins. Co. v. Olick*, 151 F.3d 132, 137(3d Cir. 1998). The FAA "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). These provisions evidence a "liberal federal policy favoring arbitration agreements." *Id.* at 24. In order for the FAA to apply, the district court must find that the contract with the arbitration provision "evidenc[es] a transaction involving [interstate] commerce." *Id.* (citing 9 U.S.C. § 2). This is not a rigorous inquiry; in fact, the contract "need have only the slightest nexus with interstate commerce." *Crawford v. W. Jersey Health Sys. (Voorhees Div.)*, 847 F. Supp. 1232, 1240 (D.N.J. 1994) (citations omitted).

In addressing a motion to compel arbitration, a court must determine: (1) whether the parties agreed to arbitrate; (2) the scope of that agreement; and (3) whether Congress intended the asserted federal claims to be nonarbitrable. *Parker v. Hahnemann Univ. Hosp.*, 2001 WL 797247, at *5 (D.N.J. Jan. 15, 2001) (citing *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 609-10 (D.S.C. 1998)). The parties do not disagree as to these prongs. Instead, Plaintiffs maintain

that they have already complied with arbitration, and that Defendants are the ones that have committed fraud in failing to comply with the arbitration award. Indeed, in their preliminary statement in opposition to Defendants' motion, Plaintiffs state:

> The matter before this Court is not a difficult or complicated matter, The issue is simple: ***where did plaintiffs' $29.000.00 go?*** That is, the question becomes: (1) ***whether defendant attorneys, Pressler & Pressler, Wolpoff & Abramson, and Gerald Felt, partner Pressler & Pressler, – paid MBNA the monies that they received from plaintiffs in the sum of approximately $29,000.00 in October, 2004 in satisfaction and full payment of plaintiffs MBNA accounts, as they represented to plaintiffs that they represented MBNA and would indeed pay MBNA the $29.000.00 which was more than payment in full of plaintiffs MBNA accounts and if said defendants did indeed pay MBNA plaintiffs' monies then MBNA has violated federal statutes, defrauded and defamed plaintiffs by reporting account as "delinquent and unpaid,"*** Or (2) ***did attorney defendants misrepresent and defraud plaintiffs by purposefully and intentionally fail to pay plaintiffs' MBNA accounts as they had represented to plaintiffs that they would indeed pay MBNA with plaintiffs' $29,000.00 that was forwarded to Pressler & Pressler in October, 2004.***

[CM/ECS Docket Entry # 13](Emphasis in original).

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The FAA centers around contract interpretation. *AT & T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986); *Harrison v. Nissan Motor Corp. in U.S.A.*, 111 F.3d 343, 350 (3d Cir. 1997) ("'[Arbitration is [a] creature of contract, a device of the parties rather than the judicial process. If the parties have agreed to submit a dispute for a decision by a third party, they have agreed to arbitration.'") (quoting *AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456, 460 (S.D.N.Y. 1985)); *Trap Rock Indus., Inc. v. Local 825, Int'l Union of Operating Eng'rs, AFL-CIO*, 982 F.2d. 884, 888 (3d Cir. 1992). State contract principles apply in ascertaining whether the parties to an action have agreed to arbitrate. *First Options of Chicago. Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Blair v. Scott Specialty Gases*, 283 F.3d 595, 603 (3d Cir. 2002). The New Jersey Supreme Court has held that "parties to an agreement may waive statutory remedies in favor of arbitration. . . ." *Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A.*, 773 A.2d 665, 670 (N.J. 2001) (citations omitted).

The agreement governing the pertinent accounts with MBNA contain arbitration provisions providing that all disputes and/or claims be submitted to binding arbitration before the National Arbitration Forum. (Eastburn Aff. Ex 1; Ex. 2, Ex. 3.) The arbitration provision specifically states:

> Any claim or dispute ("Claim") by either you or us against the other, or against the employees, agents, or assigns of the other, arising from or relative in anyway to this Agreement or any prior Agreement or your account (whether under a statute, in contract, tort, or otherwise and whether

> for money damages, penalties, or declaratory or equitable relief), including Claims regarding the applicability of this Arbitration and Litigation section or the validity of the entire Agreement of any prior Agreement, shall be resolved by binding arbitration.

(Eastburn. Aff. Ex.1 at 9-10, Ex. 2 at 9-10, Ex. 3 at 9-10). Defendant MBNA is certainly contemplated by this provision. Additionally, Defendants Wolpoff & Abramson, LLP, Pressler and Pressler, and Gerald J, Felt, Esq. would constitute either MBNA's agents or assigns.

In New Jersey, there is a general policy in favor of arbitration of disputes. *Garfinkel*, 773 A.2d at 670 ("[O]ur jurisprudence has recognized arbitration as a favored method for resolving disputes.") (citing *Barcon Assocs. v. Tri-County Asphalt Corp.*, 430 A.2d 214, 217 (N.J. 1981)). Morever, an agreement to arbitrate should be read liberally in favor of arbitration. *J. Baranello & Sons, Inc. v. City of Paterson*, 403 A.2d 919, 921 (N.J. Super. Ct. App. Div. 1979) (citing *Moreira Constr. Co. v. Township of Wayne*, 238 A.2d 185, 188 (N.J. Super. Ct. App. Div.), *certif. denied*, 242 A.2d 15 (N.J. 1968)). In light of the relevant facts and case law, this Court holds that Defendants have met their burden of demonstrating that an agreement between Plaintiffs and these moving Defendants to arbitrate was made and that these claims are subject to arbitration.

In their objection to Magistrate Judge Hedges' recommendation that the parties be compelled to arbitrate Count I of the Amended Complaint, Plaintiffs raise a new

argument as to why they should not be compelled to arbitrate. Plaintiffs contend that there is a "pre-existing financially beneficial relationship between NAF and Wolpoff & Abramson," (Pl.'s Obj. to R&R at 16), based solely on some allegedly momentous piece of evidence recently obtained stating that Wolpoff & Abramson is the National Arbitration Forum's first Certified Arbitration Manager. On September 23, 2005, in support of the reply brief submitted in support of Defendant NAF's motion to dismiss, NAF's Managing Director, Edward C. Anderson, submitted a Certification explaining that organizations and individuals that have been designated "certified arbitration managers" with the NAF are merely organizations and individuals that have been pre-qualified to file arbitration documents electronically with the NAF. (Anderson Cert. ¶¶ 3-4). Mr. Anderson further certified that "[t]here has never been a financial relationship between the Forum and Wolpoff & Abramson." (Anderson Cert. ¶ 5). Plaintiffs had this Certification in their possession since September 23, 2005, yet still raised this allegation in their objection filed December 12, 2005. Of particular concern to the Court is that Plaintiffs did not attempt to distinguish their alleged evidence of collusion from the statements made in Mr. Anderson's Certification. The Court concludes that Plaintiffs have not demonstrated a financial relationship between Wolpoff & Abramson and the NAF that would demonstrate a reason for the Court not to compel arbitration with the NAF. Further, Plaintiffs' counsel is advised to heed Federal Rule 11's requirements that when she signs a document filed with this Court that she has made a "reasonable inquiry" as to the facts concerning the document. Fed. R. Civ. P. 11(b).

Given the foregoing, the proceedings must be stayed pending arbitration pursuant to the FAA. The FAA provides that:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement. . . .

9 U.S.C. § 3. "If the issues in the case are within the contemplation of the arbitration agreement, the FAA's stay-of-litigation provision is mandatory, and there is no discretion vested in the district court to deny the stay." *U.S. v. Bankers Ins. Co.*, 245 F.3d 315, 319 (4th Cir. 2001) (citing *In re Complaint of Hornbeck Offshore Corp.*, 981 F.2d 752, 754 (5th Cir. 1993)); *see also Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 937 (4th Cir. 1999) ("When a valid agreement to arbitrate exists between the parties and covers the matter in dispute, the FAA commands the federal courts to stay any ongoing judicial proceedings, 9 U.S.C. § 3, and to compel arbitration, *id.* § 4.").

As this Court has already determined that Plaintiffs' claims are arbitrable, the FAA mandates that the Court stay this proceeding and compel Plaintiffs' remaining claims to an arbitrable forum. The following claims remain to be

arbitrated: Count I - Violation of Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, *et seq.*, as to Defendants Wolpoff & Abramson, LLP, Pressler and Pressler, and Gerald J. Felt, Esq. Count II - Violation of the Federal Arbitration Act as to Defendants MBNA, Wolpoff & Abramson, LLP, Pressler and Pressler, and Gerald J. Felt, Esq. Count III - Violation of Plaintiffs' rights to equal protection and due process under the 14th Amendment as to Defendants MBNA, Wolpoff & Abramson, LLP, Pressler and Pressler, and Gerald J. Felt, Esq. Count IV - Liability for Misrepresentations to the Superior Court of New Jersey as to Defendants MBNA, Wolpoff & Abramson, LLP, Pressler and Pressler, and Gerald J. Felt, Esq. Count V - Violation of the New Jersey Consumer Fraud Act as to Defendants MBNA, Wolpoff & Abramson, LLP, Pressler and Pressler, and Gerald J. Felt, Esq. Count VI - Defamation as to Defendants MBNA, Wolpoff & Abramson, LLP, Pressler and Pressler, and Gerald J. Felt, Esq. Count VII - Intentional Infliction of Emotional Distress as to Defendants MBNA, Wolpoff & Abramson, LLP, Pressler and Pressler, and Gerald J. Felt, Esq. Count VIII - Violation of Fair Credit Reporting Act as to only Defendant MBNA.

CONCLUSION

For the foregoing reasons, it is on this 19th day of December, 2005, hereby

ORDERED that Plaintiffs' appeal of Magistrate Judge Hedges' decision denying their motion to amend [CM/ECF Docket Entry # 22] the Amended Complaint is **DENIED** and

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Magistrate Judge Hedges' ruling is **AFFIRMED;** and it is further

ORDERED that the Report and Recommendation of Magistrate Judge Hedges dated December 7, 2005 and December 9, 2005 [CM/ECF Docket Entries # 34, 36] is hereby **REJECTED;** and it is further

ORDERED that Defendants' motion to dismiss the Amended Complaint [CM/ECF Docket Entry # 10] is DENIED, without prejudice, and their motion to compel arbitration is **GRANTED;** and it is further

ORDERED that this proceeding is **STAYED.**

/s/ Jose L. Linares
JOSE L. LINARES,
UNITED STATES DISTRICT JUDGE

DATED: December 19, 2005

APPENDIX D — AMENDED REPORT, RECOMMENDATION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED DECEMBER 7, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 05-1771

ELEANOR and RALPH SCHIANO, as wife and husband, and individually

Plaintiff(s),

vs.

MBNA corporation; WOLPOFF & ABRAMSON; LLP; PRESSLER & PRESSLER, Counsellors at Law; GERALD FELT, Esq., Partner Pressler & Pressler, personally; NATIONAL ARBITRATION FORUM,

Defendant(s.)

AMENDED REPORT, RECOMMENDATION AND ORDER

INTRODUCTION

This matter comes before me on the motion of defendants MBNA Corporation, Wolpoff & Abramson, LLP, Pressler & Pressler and Gerald Felt (collectively "MBNA") to dismiss the Complaint of plaintiffs Eleanor and Ralph Schiano ("Schianos"). The motion was referred to me by Judge Jose

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L. Linares, U.S.D.J. Also before me is the Schianos' motion to amend their First Amended Complaint. I have considered the papers submitted in support of and in opposition to the motions. There was no oral argument. Rule 78.[1]

BACKGROUND

The relevant facts have been described in the Report and Recommendation I issued on November 6, 2005. Significantly, the arbitration of the dispute between MBNA and the Schianos extended over a period of one and a half years and resulted in a decision awarding damages to MBNA in the amount of $35,000 on June 4,2004. The Schianos' Complaint was filed on April 4, 2005. The Schianos did not move to vacate or dispute the arbitration award until MBNA moved to dismiss this action.

ANALYSIS

A. MBNA's Motion to Dismiss the Complaint

1. Federal Jurisdiction

The Schianos maintain that federal jurisdiction exists on the basis of federal question and diversity of citizenship. The Federal Arbitration Act ("FAA") does not give rise to a question of federal jurisdiction and thus the only plausible basis for asserting federal jurisdiction may be found under

1. This Amended Report, Recommendation and Order has been filed to reflect very minor changes, and in no way affects the analysis or substantive aspects of the original Report, Recommendation and Order filed on December 7, 2005.

the Fair Debt Collection Practices Act (FDCPA) set forth under Count I of the Complaint. MBNA argues that Count I does not satisfy Fed. R. Civ. P. 9 pleading requirements. However, the applicable standard for pleading a cause of action based in FDCPA is Rule 8(a); notice pleading. All the rule requires is a "short and plain statement of the claim that gives the defendant fair notice of the plaintiff's claim and the grounds upon which it rests." Rule 8(a)(2); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

A FDCPA plaintiff need only set forth sufficient factual allegations in violation of the Act. *Gorman v. Wolpoff & Abramson*, 370 F. Supp.2d 1005, 1011 (N.D. Cal. 2005). Subsection (a) of 15 U.S.C. 1681s "imposes a duty upon furnishers of information to provide accurate information. It prohibits the reporting of erroneous information, imposes a duty to correct and update information, and imposes a duty to provide notice of a consumer's dispute." *Gorman*, 370 F. Supp.2d at 1011. Subsection (b) further imposes a duty "to conduct an investigation, review all relevant information, report results, and modify, delete or block inaccurate or incomplete information. *Gorman*, 370 F. Supp.2d at 1011.

Count I of the Schianos' Complaint specifies that its claim arose from MBNA's failure to acknowledge receipt of the $29,000 either to them or the reporting agencies. The Schianos state that they attempted to resolve the issue with MBNA and that MBNA took no steps to remedy the erroneous reporting which caused them harm. MBNA states that it was in possession of the monies but does not refute having reported that it did not receive the monies in question. It appears that the Schianos set forth allegations of false reporting in

violation of Subsections (a) and (b) of the FDCPA, thus giving adequate notice to MBNA. I find that this Court has federal question jurisdiction and I need not address diversity of citizenship.

2. Preemption

MBNA argues that the FDCPA preempts Counts IV through VIII of the Schianos' Complaint. These assert the following causes of action; False misrepresentation, violation of N.J.S.A. 56:8-2, false advertisement, false credit reporting premised under New Jersey State common law and intentional infliction of emotional distress.

The FDCA contains several preemption provisions, some of which are general and some are specific. "Subsection 1681t(b) is a general preemption provision . . . Subsection 1681h(e), by contrast, is a specific provision that preempts, inter alia, certain defamation claims." *Gorman*, 370 F. Supp.2d at 1009. 15 U.S.C. 168h(e) provides qualified immunity to reporting agencies as to state law claims related to the disclosure of information. *Stafford v. Cross Country Bank*, 262 F. Supp.2d 776, 788 (W.D. Ky 2003). However, this qualified immunity does not extend to false information furnished with malice or with willful intent to injure. *Wiggins v. Equifax Services, Inc.*, 848 F. Supp. 213, 223 (D.D.C. 1993). "Actions showing a 'reckless indifference' to plaintiff's rights under the [FDCPA] can also constitute willfulness . . . In that context, a statement is deemed to have been made with malice when the speaker either knew it was false or acted in reckless disregard of its truth or falsity." *Veno v. AT&T Corp.*, 297 F. Supp.2d 379, 384 (D. Mass. 2003).

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As the New Jersey statutory and common law causes of action arise from MBNA's disclosure of information to reporting agencies these are preempted. Pertaining to the intentional infliction of emotional distress cause of action, the Schianos state that despite their efforts to communicate with MBNA regarding its erroneous reporting of unsatisfied debt, MBNA took no steps to correct its mistake. To the contrary, it confirmed with the reporting agencies that it had not received the monies in question. MBNA's alleged failure to investigate whether it had possession of the monies reported delinquent after the Schianos' inquiry and its subsequent confirmation of false representations, at a minimum, may constitute reckless disregard to the truth or falsity of the information it disseminated to reporting agencies. Accordingly, no qualified immunity attaches to the intentional infliction of emotional distress cause of action.

3. Adequacy of the Pleadings

MBNA argues that the Schianos' pleadings fail to set forth actions based in violation of Fourteenth Amendment rights and the FDCPA as well as intentional infliction of emotional distress. As discussed above under Jurisdiction, the Schianos properly pleaded the FDCPA cause of action. The Second cause of action of the Schianos' Complaint has also been addressed in my previous Report and Recommendation, finding that the NAF is protected from suit pursuant to the arbitral immunity. As for Count IV, the Schianos provide no legal basis to impose Fourteenth Amendment requirements on private actors, and accordingly, they fail to set forth any basis for the relief sought under this cause of action.

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As for the Schianos' intentional infliction of emotional distress claim, the court decides as a matter of law whether emotional distress can be found and the jury decides whether in fact it has been proven. *Perry v. Gold & Laine, P.C.*, 371 F. Supp.2d 622, 627 (D.N.J. 2005). To establish an intentional infliction of emotional distress cause of action, the Schianos must show (1) intentional and outrageous conduct that is so severe as to expect no reasonable individual to endure, (2) proximate cause, and (3) severe distress. *Perry*, 371 F. Supp. 2d at 627.

MBNA's actions after the arbitration award was issued will be considered in evaluating outrageousness of its conduct. It appears that MBNA's actions, even if intentional were not directed at the Schianos. All information was forwarded to reporting agencies. Presuming that the information disseminated was false, the conduct itself is not so outrageous as to render reasonable people unexpected to endure the same. Considering that notwithstanding their "bad" credit, the Schianos were able to refinance their home, albeit on unfavorable terms. The Eighth Count of the Complaint, alleges "mental and emotional anguish." Nowhere in the Complaint did the Schianos set forth factual allegations of severe mental distress, The Schianos' intentional infliction of emotional distress cause of action must fail as a matter of law.

B. The Schianos' Motion to Amend their Fist Amended Complaint

Rule 15(a) provides in relevant part that, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave to amend shall

be freely given when justice so requires." Leave to amend may be denied for four reasons: 1) undue delay, 2) bad faith or dilatory motive, 3) undue prejudice, or 4) futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Rolo v. City of Investing Co. Liquidating Trust*, 155 F.3d 644, 654 (3d Cir. 1998). An amendment will be considered futile if it "is frivolous or advances a claim that is legally insufficient on its face." *Harrison Beverage Co. v. Dribeck Importers, Inc.*, 133 F.R.D. 463, 468 (D.N.J. 1990). Futility of a proposed amendment is analyzed using the motion to dismiss standard. *Massarky v. General Motors Corp.*, 706 F.2d 111, 125 (3d Cir. 1983), *cert. denied*, 464 U.S. 937 (1983). Courts look at the proposed amended pleading for factual support of the claims advanced and all allegations made by a plaintiff are to be regarded as true. *Kulwicki v. Dawson*, 969 F.2d 1454, 1462 (3d Cir. 1992).

The Schianos seek to amend their Complaint to include a vacation of the arbitration award provision. It is well-settled law that absent a statutory basis for vacating an arbitration award, the award is considered proper. *Jereddi Prasad, M.D., Inc. v. Investors Associates, Inc.*, 82 F. Supp.2d 365, 367 (D.N.J. 2000); *Landers Co v. MMP Invs., Inc.*, 107 F.3d 476, 478 (7th Cir. 1997) and *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 177 (2d Cir. 1984). Section 12 of the FAA provides for a three months period during which a party may move to vacate, modify or otherwise dispute an arbitration award. "[I]f a defendant has important defenses to an arbitration award, he should raise them within the period prescribed for actions to vacate [otherwise they will be considered waived]." *Pitcairn Enterprises, Inc. v. Universal Computer Consulting, Inc.*, 45 Fed. Appx. 183, 186 (3d Cir. 2002); and *Serv.*

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Employees Int'l Union Local 36, AFL-CIO v. City of Cleaning Co., 982 F.2d 89, 93 (3d Cir. 1992). Even in the case that the party's motion to vacate or otherwise modify the award was timely, this court has extremely limited authority in reviewing the award. *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379 (3d Cir. 1995).

> [T]he mere 'appearance' of bias is grounds for an arbitrator's removal during the arbitration proceedings, it is an insufficient basis for this court to upset the panel's determination. Instead Wood's apparent conflict - if found to exist - must rise to the level of 'evident partiality,' which is demonstrated through proof of circumstances 'powerfully suggestive of bias.'

Jereddi Prasad, 82 F. Supp.2d at 370.

The arbitration award against the Schianos was issued almost one year prior to the filing of their Complaint. Clearly, the period in which they could have raised any defenses contesting the award has lapsed. The Schianos did not provide any explanation for the delay to justify the exercise of any discretion which this Court may have to expand the three month period in contradiction of the congressional intent to limit the same. Furthermore, no reasonable basis for setting the arbitration award aside has been set forth in the Complaint or in their moving papers. Accordingly, the amendment sought by the Schianos fails to state legal basis for the remedy sought and thus cannot be granted.

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C. MBNA's Motion to Compel Arbitration

In the alternative, MBNA moves this Court to compel arbitration of any issues that remain open pursuant to the arbitration agreement. The Schianos raise post-arbitration issues necessarily relevant to the underlying arbitration; "where did plaintiff's $29,000 [paid in satisfaction of the debt] go?." Further they did not advance any argument in opposition to MBNA's demand for arbitration. Pursuant to 9 U.S.C. 2., arbitration provisions are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *See Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003). "[U]nder the [FAA] courts must enforce private agreements to arbitrate just as they would ordinary contract: in accordance with their terms." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, (2002) (concurrence). Moreover, a substantially related issue was previously submitted to arbitration and was arbitrated for a period of a year and one half. Therefore, arbitration is the more appropriate manner to resolve the pending FDCPA claim.

CONCLUSION

For the reasons set forth above, I recommend that MBNA's motion to dismiss Count II through VIII of the Schianos Complaint be GRANTED with prejudice;

It is further recommended that the parties submit Count I of the Complaint to arbitration;

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It is further Ordered that the Schianos' motion to Amend their First Amended Complaint is DENIED; and

It is further ordered, that pursuant to Local Civil Rule 72.1(c)(2), the parties shall have ten (10) days from receipt of this Report and Recommendation to tile and serve objections thereto.

Date: December 7, 2005

s/ Ronald J. Hedges
United States Magistrate Judge

APPENDIX E — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED NOVEMBER 16, 2005

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 05-1771

ELEANOR AND RALPH SCHIANO
as wife and husband, and individually

Plaintiff(s),

vs.

MBNA corporation; WOLPOFF & ABRAMSON; LLP; PRESSLER & PRESSLER, Counsellors at Law; GERALD FELT, Esq., Partner Pressler & Pressler, personally; NATIONAL ARBITRATION FORUM,

Defendant(s).

REPORT AND RECOMMENDATION

INTRODUCTION

This matter comes before me on the motion of defendant National Arbitration Forum ("NAF") to dismiss the Amended Complaint for failure to state a claim upon which relief can be granted pursuant to Rule12(b)(6). The motion was referred to me by Judge Linares. I have considered the papers

submitted in support of and in opposition to the motion. There was no oral argument. Rule 78.

RELEVANT FACTS

On or about December, 2002, Plaintiff Ralph Schiano ("Schiano") lost his job and became seriously ill. As a result, he could not obtain new employment. Schiano attempted to settle three accounts with MBNA. MBNA agreed to settle the one account that was solely in his name for approximately one-third of the balance owed (30%) but refused to settle the two accounts in Plaintiff Eleanor Schiano's name, totaling approximately $25,800.00. until she defaulted in making payments. (Am. Compl. Count One ¶ 10). On March 5, 2003, MBNA forwarded a notice of intent to arbitrate. The letter stated that the rules of the NAF would govern the arbitration process. Soon thereafter, Wolpoff & Abramson ("W&A") commenced debt collection activity as the agent of MBNA. In November, 2003, plaintiffs received notice of arbitration with NAF. Plaintiffs claim that although W&A received a copy of the form that NAF requires according to its own Code of Procedure in order to initiate a claim, plaintiffs did not. (Second br. in Opp'n to Df.'s mot. to dismiss Compl. p. 5).

At the same time, unbeknownst to plaintiffs, the two MBNA accounts in Mrs. Schiano's name had been charged off or sold to W&A in July 2003. (Pls. App. 47-50, Transunion credit report). MBNA no longer had a financial interest in the accounts.

On February 23, 2004, an arbitration hearing on the papers was scheduled. Plaintiffs were given 10 days to submit documents. Plaintiffs allege that discovery was not allowed.

(Second Br. in Opp'n to Df.'s mot. to dismiss, p. 7). In April, 2004, plaintiffs received a settlement offer from W&A for $16,000 in satisfaction of the two remaining accounts (First Br. In Opp'n to Df's mot. to dismiss, p. 6). In May, 2004, after the settlement offer expired, NAF requested that W&A forward any settlement offers. On or about June 4, 2004, NAF issued awards in favor of MBNA (represented by W&A), and adverse to plaintiffs for the two accounts totaling $35,000: $25,000.00, full amount of the debt, and *$10,000.00 in legal fees.* (Second Br. In Opp'n to Df's mot. to dismiss, p. 9). Plaintiffs assert that implied by NAF's act of awarding legal fees is that NAF knew that plaintiffs' debt was not charged off, but was purchased by W&A.

Extremely disturbed with the award, plaintiffs discharged their attorney. Plaintiffs contacted MBNA directly. An MBNA employee infonned plaintiffs that the accounts were sold in September, 2003 and that MBNA no longer had plaintiffs' records. (Pls.['] Certification of telephone conversation). However, an affidavit dated May 26, 2005 submitted by an MBNA employee, Matthew Eastburn, stated that MBNA has been the custodian of records since the sale of plaintiffs' accounts in July, 2003.

After the commencement of this action in October of 2004, the plaintiffs discovered that Aaron Rose, Vice President/Assistant General Counsel of NAF and Stuart Wolpoff of W&A had conducted an annual seminar in which W&A was identified as the first Certified Arbitration Manager of NAF. (Second Br. in opp'n to Df.'s mot. to dismiss, p. 8, September 2002 Seminar flyer, Pls.['] App. 25-32).

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Plaintiffs did not avail themselves of the appeal provision of the Federal Arbitration Act, 9 U.S.C. § 12. After the statutory time limitation of three months to file to vacate the arbitration award lapsed (9 U.S.C. § 12), plaintiffs filed the pending action, charging NAF with violating the Federal Arbitration Act ("FAA") by obtaining arbitration awards procured by collusion, corruption, fraud, and deliberate and purposeful delay, with violating 15 U.S.C. § 1692(e), (the Fair Debt Collection Practices Act ("FDCPA")), with violating plaintiffs' equal protection and due process rights guaranteed under the Fourteenth Amendment, with committing fraud and misrepresentation (that plaintiffs were subject to arbitration, and that arbitration awards were valid judgments), with committing consumer fraud pursuant to N.J.S.A. 56:8-2, with defamation, and with intentional infliction of emotional distress.

DISCUSSION

I. STANDARDOF REVIEW

Rule 12(b)(6)

Rule 12(b)(6) allows a party to move for dismissal based upon the pleader's "failure to state a claim upon which relief can be granted." District courts generally disfavor Rule 12(b)(6) motions because the long-established policy of the federal rules is to decide cases on the merits. *Caldwell Trucking PRP Group v. Spaulding Composites, Co., Inc.*, 890 F. Supp. 1247, 1252 (D.N.J. 1995); *Panek v. Bogucz*, 718 F. Supp. 1228, 1229 (D.N.J. 1989).

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"The issue is not whether PlaintiffS will ultimately prevail but whether the claimants are entitled to offer evidence to support the claims." *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974). "All the rules require is a short and plain statement of the claim that gives the defendant fair notice of the Plaintiffs' claim and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957); *see Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

In deciding a Rule 12(b)(6) motion to dismiss for failure to state a claim, the district court accepts as true all allegations and draws all reasonable inferences in the light most favorable to the Plaintiff. *Weston v. Pennsylvania*, 251 F.3d 420, 425 (3d Cir. 2001). Rule 12(b)(6) does not permit "dismissals based on a judge's disbelief of a complaint's factual allegations," *Neitzke v. Williams*, 490 U.S. 319, 327 (1989), but a court should reject legal conclusions presented in the form of factual allegations. *Bright v. Westmoreland County*, 380 F.3d 729, 745 (3d Cir. 2004). Accepting the facts in the pleadings as true and giving these all reasonable inferences, a court must dismiss under Rule 12(b)(6), "[i]f as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Neitzke*, 490 U.S. at 327 (quoting *Hishon v. King & Spalding*,467 U.S. 69, 73 (1957)).

II. ANALYSIS

The sole question before me is whether the FAA authorizes *an untimely* cause of action to vacate an award with respect to a consummated arbitration proceeding pursuant to an agreement in which the defendant is alleged to have

granted the award by collusion, corruption, fraud, deliberate and purposeful delay and evidence of partiality and/or corruption. Despite the lack of binding precedent in the Third Circuit, strong federal policy, as manifested in the FAA and case law, favor final adjudication of differences by a means selected by the parties who agree to arbitration. Thus, NAF's motion to dismiss should be granted.

THE FAA PROVIDES THE EXCLUSIVE REMEDY

9 U.S.C § 2 states that a written provision in any contract evidencing a transaction to settle by arbitration is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The issues raised in the Amended Complaint fall squarely within the scope of Sections 10-12 of the FAA. Plaintiffs did not avail themselves of the review provisions of Section 10 and may not make an impermissible collateral attack on an award by alleging other causes of action. "Where a party files a complaint in federal court seeking damages for an alleged wrongdoing that compromised an arbitration award and caused the party injury, it is no more, in substance, than an impermissible collateral attack on the award itself." *Decker v. Merrill Lynch*, 205 F. 3d 906, 910 (6th Cir. 2000).

9 U.S.C. § 12 requires that a motion to vacate an award be served upon the other party within three months from the date the award was made. "The three month notice requirement in § 12 for an appeal of the award on §§ 10 or 11 grounds would be meaningless if a party to the arbitration proceedings may assert in a collateral attack claims outside

of the statutory time period provided for in § 12." *Sanders-Midwest, Inc., v. Midwest Pipe Fabricators, Inc.*, 857 F.2d 1235, 1238 (8th Cir. 1988). Here, the plaintiffs clearly failed to bring a timely motion to vacate the atbitration award. Thus, this Court cannot provide any relief under the FAA.

Plaintiffs cite to *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968), in which the Supreme Court set aside an award for the defendant, stating that there was no basis for refusing to follow the broad statutory language of the FAA, 9 U.S.C. § 10. 393 U.S. at 148. However, *Commonwealth Coatings Corp* is silent as to whether or not the motion to vacate was sought in a timely manner as authorized under the FAA. *See Decker*, 205 F.3d at 909, holding that "once an arbitration is conducted under a valid arbitration contract, the FAA 'provides the exclusive remedy for challenging acts that taint an arbitration award.'").

ARBITRAL IMMUNITY

"Arbitral immunity is essential to protect the decision-maker from undue influence or intimidation and protect the decision-making process from reprisals by dissatisfied litigants." *Corey v. New York Stock Exchange*, 691 F.2d 1205, 1211 (6th Cir. 1982); *see Burns v. Reed*, 500 U.S. 478, 99-500 (1991).

Plaintiffs claim that NAF is not entitled to arbitral immunity because their claim is against the arbitration organization and not the arbitrators individually. However, "quasi judicial immunity expands to protect associations, boards, and other organizations sponsoring or administering

arbitrations." *Austern v. The Chicago Board Options Exchange*, 716 F. Supp. 121, 123 (S.D.N,Y. 1989). "It would be of little value to the whole arbitral procedure to merely shift the liability to the sponsoring association." *Corey*, 691 F. 2d at 1211; *see Hawkins v. National Association of Securities Dealers, Inc. et al.*, 149 F.3d 330 (5th Cir. 1998).

Even if there was no arbitration agreement, the sponsoring arbitration forum is entitled to arbitral immunity in processing a "facially valid" demand that names it as the arbitral agency. *See New England Cleaning Services, Inc. v. American Arbitration Association* 199F. 3d 542, 544 (1st Cir. 1999). The *only* exception to arbitral immunity is where the papers demanding arbitration are so "deficient on their face as to signal a 'clear absence of jurisdiction." 199 F.3d at 546. Here, the demand for arbitration was not obviously facially deficient.

EQUITABLE TOLLING

While courts have recognized equitable tolling under certain circumstances, plaintiffs' claims do not fall within those circumstances. The exceptions include an illegal contract clause or an illegal appointment of an arbitrator. *See I.U.B.A.C. Local Union No. 31 v. Anastasi Bros. Corp.*, 600 F. Supp. 92 (S.D. Fla. 1984) (employers did not waive their claim where the underlying contract clause upon which arbitration was based was illegal); *American Guaranty Co. v. Caldwell*, 72 F.2d 209, 211 (9th Cir. 1934): plaintiff's claim was not waived inasmuch as arbitrator was illegally and improperly appointed).

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CONCLUSION

All of the plaintiffs' claims seek to enforce liabilities or duties created by the FAA and governed exclusively by its provisions. In light of the strong federal policy in favor of enforcing arbitration agreements, courts only have a limited role in reviewing arbitration awards, *Decker*, 205 F. 3d at 910. Since the plaintiffs failed to comply with the statutory precondition by not following the proper procedure for challenging the arbitration award under the FAA, they have forfeited their right to judicial review. *Decker*, 205 F. 3d at 911.

Because I have recommended that Plaintiffs' claims are barred by arbitral immunity, there is no need to discuss the merits of the plaintiffs' remaining claims.

For the reasons set forth above, I recommend that NAF's motion to dimiss should be GRANTED.

Pursuant to Local Civil Rule 72.1(c)(2), the parties have ten (10) days from receipt of this Report and Recommendation to file and serve objections.

s/ Ronald J. Hedges
United States District Judge

APPENDIX F — SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BAN OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MAY 5, 2006

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 05-5565

IN RE: ELEANOR SCHIANO AND RALPH SCHIANO,

Petitioners

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil No. 05-cv-01771)
District Judge: Jose L. Linares

Present: SCIRICA, *Chief Judge*, SLOVITER, ROTH, McKEE, RENDELL, BARRY, FUENTES, SMITH, FISHER, VAN ANTWERPEN, and BECKER,* *Circuit Judges*

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by petitioners having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in

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* Honorable Edward R. Becker, Senior Judge of the United States Court of Appeals for the Third Circuit; vote limited to panel rehearing.

active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/ *Marjorie 0. Rendell*
Circuit Judge

Dated: May 5, 2006